In the circumstances, in my opinion, the High Court has jurisdiction to deal with the matter, even though the question raised might have effect on any provisions of the Federal Constitution.

I would therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Lim Kean Chye & Co.*

UHG v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Gill J.) July 21, 1973]

[Kuala Lumpur — Originating Motion No. 42 of 1972]

Income Tax — Operator of taxi-cabs — Whether drivers of taxi-cabs employees — Deductions claimed for salaries of drivers and for diesel fuel — Taxis hired on rentals — Findings of fact by Special Commissioners — Whether can be supported by evidence — Case stated — Income Tax Act, 1967, ss. 91(1) & 140.

The Director-General of Inland Revenue had assessed the appellants on the profits made by them in the business as operators of taxi-cabs and had disallowed the expenditure alleged to have been incurred in respect of wages and payments for diesel fuel. On appeal the Special Commissioners held that the appellant had in fact hired out the taxis on rentals and had not paid wages or salaries to the taxi-drivers or paid for the diesel fuel. The appellant appealed to the High Court by way of case stated and the question of law for the opinion of the court was whether on the facts found by the Special Commissioners there was evidence to support their decision.

Held: there was evidence to support the finding of the Special Commissioners and they were right in upholding the disallowance by the respondent of the expenditure for wages and diesel fuel.

CASE STATED.

V. K. Palasuntharam for the appellants.

Zulkifli bin Mohamad (Federal Counsel) for the respondent.

Gill F.J.: By eleven notices of assessment dated June 5, 1970, the respondent levied additional income tax on the appellants for the eleven years of assessment from 1959 to 1969 inclusive in respect of the profits made by them in their business as operators of taxi-cabs within and outside the Kuala Lumpur Municipal limits. In doing so, the respondent disallowed the expenditure alleged by the appellants to have been incurred by them in the production of their income in respect of wages and payments for diesel fuel as shown in their accounts.

The appellants appealed to the Special Commissioners of Income Tax. Their appeal was initially fixed for hearing on April 28, 1971 when it was adjourned at the request of their first counsel to July 29 and then to September 2 when the hearing took place. On September 3 the appellants' counsel applied for an adjournment to discuss a settlement with the Department, but he withdrew from the case on the next date of hearing on September 13. The appellants then briefed another counsel who withdrew from the case without taking any part in the hearing of the appeal. At the hearing on December 6 to 10 two counsel appeared for the appellants, but they withdrew before the next hearing which was fixed for February 1, 1972 when it was adjourned to February 21 to enable the appellants to secure the services of another counsel. The next counsel for the appellants applied for an adjournment of the hearing until June or July, 1972. The application was refused. Yet another counsel appeared for the appellants at the hearing on February 21 to 22 but he withdrew from the case on February 23 when hearing continued with the managing director representing the appellants. On February 24 the hearing was adjourned to enable the appellants to get confirmation that another counsel would appear. No confirmation having been produced, the hearing was continued on February 24 and 25. On February 26 a counsel appeared and asked for an adjournment which was refused. The hearing was continued with the managing director appearing for the appellants and concluded on March 3. The Special Commissioners made their deciding order on March 6, 1972.

The issue before the Special Commissioners was the simple issue of disallowance by the respondent of the alleged expenditure by the appellants in the production of their income. In support of their case that the drivers of the taxi-cabs were their employees and that they paid for the diesel fuel, the appellants called twelve witnesses. The respondent called nine witnesses, three of whom were former taxi drivers of the appellants, to show that the taxis were in fact hired out to the drivers on daily rentals and that the hirers themselves paid for the diesel fuel. Six other former taxi drivers were made available for the appellants who elected not to call them. Evidence was produced that before the appellants installed a diesel pump in 1967 or 1968, the drivers bought fuel from other petrol kiosks out of their collections and that on their return to the garage they had to surrender their receipts for the fuel bought but that they were never reimbursed for what they had paid. There was also evidence that after the installation of the pump the appellants bought diesel in bulk and retailed it to the drivers at 80 cents a gallon. In addition to hearing evidence of witnesses, the Special Commissioners examined more than a hundred documentary exhibits which were put in at the hearing.

The findings of fact which the Special Commissioners made were that the so-called contracts of service drawn up between the appellants and the drivers were not valid contracts, being signed by the drivers under duress or undue influence, so that the drivers were in fact not employees of the appellants but independent contractors who hired the taxi-cabs from the appellants on payments of rentals, that the various books and records prepared and maintained by the appellants were in several material particulars fictitious and had no relation to facts, and that the audited accounts of the appellants for the eleven years in question were inaccurate and did not reveal the true financial position of the appellants at the dates on which they were drawn up.

Having considered all the evidence produced before them and the submissions made by both parties, the conclusions to which the Special Commissioners arrived, as set out in their deciding order, may be summarised as follows. The appellants' audited accounts for each year ending on June 30 from 1958 to 1968 were inaccurate. The appellants' incomes for the aforesaid years had not been fully disclosed to the respondent. The appellants' sixteen taxis were hired out on rentals and such rentals received by the appellants in the relevant years were $113,180, $105,967, $121,454, $185,000, $185,000, $190,000, $190,000, $196,875, $190,000, $190,000 and $190,000 respectively. At all material times the appellants had not paid wages or salaries to the taxi drivers at all and the amounts of $11,116, $11,236, $6,779, $17,920, $27,101, $31,134, $31,131, $37,136, $40,846, $38,930 and $37,256 respectively which had been charged in the respective year's accounts and included in the description "wages and salaries" or "wages and salaries (driver)" were not allowable in ascertaining the appellants' chargeable income. At all material times the appellants had not borne the cost of fuel consumed by the taxis and the amount of $24,656, $21,764, $27,524, $41,144, $46,569, $38,868, $32,763, $27,341, $27,206, $24,971 and $25,103 respectively which had been charged in the respective year's account and included in the description "petrol, diesel and oil lubricants" were not allowable in ascertaining the appellants' chargeable income. In respect of the year ending on June 30, 1968 the appellants had made a profit of $3,000 from the sale of diesel fuel to taxi drivers, which profit had not been included in their income for that year. Accordingly, they made an order that the assessments of income tax on the appellants for the years of assessment 1959 to 1969 as per the eleven notices of assessment dated June 5, 1970 be amended in accordance with their findings.

From the deciding order of the Special Commissioners the appellants have now appealed to this court by way of case stated under paragraph 34 of Schedule 5 to the Income Tax Act, 1967.

The question of law for the opinion of this court is whether on the facts found by the Special Commissioners there was evidence to support their decision. That decision is challenged on a number of grounds which are set out in the notice of points of argument served by the appellants' counsel on the respondent. With all deference to the learned counsel, I do not think it necessary to deal with each of the points raised in the notice, because it is clear from the authorities that the determination of the Special Commissioners cannot be erroneous in point of law, unless it appears that they acted without any evidence or on a view of facts which could not reasonably be entertained or that the primary facts do not justify the inferences drawn or the conclusions arrived at. However, there is one point in that notice which I think should be disposed of at the very outset. The point raised is whether the eleven notices of assessment were issued under section 91(1) or section 140 of the Income Tax Act, 1967. There is nothing on the record to suggest an answer to that question, but it would appear to be obvious from the nature of the notices of assessment. They were notices of additional assessments which form the subject matter of section 91(1) of the Act. It was argued that the Director-General should have acted under section 140 of the Act rather than under section 91(1). A short answer to that argument is that it was open to the Director-General to take action under either of these sections at his choice. That disposes of the further argument that no notice was served on the appellants as required by section 140.

There are two other points which perhaps call for some consideration. They relate to the refusal by the Special Commissioners to grant an adjournment on February 26, 1972 and the alleged failure on the part of the respondent to inform the appellants beforehand that he was intending to call the appellants' former drivers to give evidence. Neither of these points, in my judgment, has any merit. It is to answer the first point that I have stated the long history of the hearing of the appeal before the Special Commissioners, from which it is clear that the appellants were given ample opportunity to present their case. In the circumstances the refusal to grant any further adjournment was fully justified. As regards the point that the respondent should have informed the appellants beforehand about his intention to call their former drivers to testify, I can think of no rule or procedure which requires a party to notify the other party as to what witnesses he intends to call and what evidence they will give. The appellants knew all along what the issue before the Special Commissioners was and they produced twelve witnesses in support of their contention that the taxi drivers were their employees and that they paid for the diesel fuel. It was open to the respondent to call what witnesses he liked, and the appellants had all the opportunity to cross-examine the witnesses which were in fact called. As I have already said, six former taxi drivers of the appellants were made available for the appellants if they chose to call them, but they elected not to do so. I can find nothing in the case stated to suggest that the appellants were in any way prejudiced in putting forward their case.

One of the grounds of appeal is that assuming that the notices of assessment were issued under section 91(1) of the Act, it was necessary for the respondent to establish at the hearing before the Special Commissioners that the appellants were guilty of fraud in failing to disclose the true nature of the transaction under which they operated their taxi-cabs. In this connection, it was argued that the findings of the Special Commissioners did not indicate that they were guided by the high standard of proof required in cases of fraud. It is further argued that in the absence of a finding that there was proof beyond reasonable doubt the Special Commissioners were not entitled to make the findings which they made.

As I have already stated, the issue before the Special Commissioners was a simple one. There were no allegations of fraud. It was not necessary for the Director-General to allege fraud. All that he had to prove was that the appellants had paid no wages or salaries to the drivers who operated their taxis, and that the cost of diesel fuel for the running of the taxis was not borne by the appellants. On that simple issue the Special Commissioners reached certain conclusions

of facts which can only be challenged on the ground that there was no evidence to support them.

That brings me to the main ground of appeal that the findings of the Special Commissioners cannot be supported by the evidence before them. The argument in support of this ground is that such findings are against the weight of the documentary evidence produced by the appellants. This documentary evidence consisted of the various service agreements. It is submitted by counsel for the appellants that a finding of fact cannot stand in the face of contradictory evidence, which is tantamount to saying that a finding of fact can be made only if there is nothing to contradict it. I regret to say, with all deference to counsel, that I cannot accept that proposition. Any court or tribunal has to choose between two versions of what actually took place. The Special Commissioners had the two versions before them. They considered each of the versions after hearing witnesses and examining documents. They stated their reasons as to why they did not accept what was alleged by the appellants. The findings which they made are findings of primary facts, so that it is not open to this court to question their accuracy. The truth is that this is not a case of which it can be said that there is no evidence to support the determination of the Special Commissioners. It is not a case in which the evidence is inconsistent with and contradictory of their determination, nor is it one in which the true and only reasonable conclusion contradicts the determination. The only inference which can be drawn from the primary facts as found by the Special Commissioners is that the appellants paid no wages to the drivers of their taxis and that the drivers themselves paid for the diesel fuel. The Special Commissioners were therefore quite right in upholding the disallowance by the respondent of such expenditure in assessing the income tax payable by the appellants.

The only other question which remains to be considered is whether the Special Commissioners were right in arriving at the amounts which the appellants received in each of the relevant years in respect of rentals. Counsel for the respondent submitted that the Special Commissioners worked out the figures on the basis of the rentals received for each shift and not on the basis of the gross takings as shown in the balance sheets. But the case stated does not make that point clear. Moreover, for the years 1958, 1959, 1960 and 1965 they would appear to have taken the figures from the relevant balance sheets, so that for the other years there would appear to be no basis for the amounts of the rentals arrived at. The evidence of the taxi drivers was that the taxis operated on two shifts and that the rentals ranged from $16 to $18 per shift or from $28 to $32 per day. The finding which the Special Commissioners made was that the taxis were hired out for $28 to $30 per day. Now, on the basis of the daily hire rental being $28 or $29 or $30, the total amount of the yearly rentals would be $163,520 or $169,360 or $175,200. Yet, none of these amounts was taken by the Special Commissioners as the rental for any of the years in question. As counsel for the appellants submitted, if the Special Commissioners took the rentals for the years 1958, 1959, 1960 and 1965 from the relevant balance sheets, no reason has been given as to why they did not do the same for the other years.

It is common ground that the amounts shown in the appellants' balance sheets as their gross takings for the years 1958 to 1968 are $113,166.00, $105,967.00, $121,454.20, $148,447.20, $169,912.31, $182,186.45, $177,808.11, $196,875.39, $174,264.00, $167,167.70 and $166,801.80. These were the amounts of the appellants' gross takings on the basis of which the Director-General issued his notices of assessment dated June 5, 1970, although it is not clear whether he took into account the profit of $3,000 which the appellants made on the sale of diesel fuel in the year 1968. If that amount was not taken into account, it should be added to the gross takings for that year. In the absence of any indication as to why the Special Commissioners made a departure from the amounts ascertained by the Director-General as the appropriate amounts on which tax should be levied, there would appear to be no alternative but to confirm the Director-General's assessment with the minor amendment of the gross takings for the year 1968 by adding thereto a sum of $3,000.

In the result, I would dismiss this appeal against the Special Commissioners' decision upholding the disallowance of the appellants' alleged expenditure in respect of wages and fuel oil but allow the appeal against their order of amended assessment by restoring the Director-General's assessments with the minor amendment of adding the sum of $3,000 to the gross takings for the year 1968 if that was not done when the notices of assessment were originally issued. In all the circumstances of the case, I would make no order as to costs.

Appeal dismissed.